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Supreme Court of the United States

October Term 1949.

No. 467

EDWARD HALLE, as executor of the estate of LOUIS HALLE, deceased,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, Brief in Support Thereof, and Appendix Containing Motion to Dispense With Printing of Exhibits for Use on Certiorari Proceedings.

EDWARD HALLE,
Attorney for Petitioner.

LOEBER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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Supreme Court of the United States

OCTOBER TERM 1949.

No. .....

EDWARD HALLE, as executor of the estate of LOUIS HALLE, deceased,

Petitioner,

AGAINST

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward Halle, in the capacity of executor of the estate of Louis Halle, deceased, respectfully prays that a *Writ of Certiorari* issue to review the decision of the United States Court of Appeals for the Second Circuit, affirming a decision of the Tax Court of the United States, which determined deficiencies in the individual income taxes of Louis Halle, deceased, for the taxable years 1929-1938, inclusive, and imposed as additions thereto 50% penalties for fraud.

While the appeal was pending in the Court of Appeals, Louis Halle, the taxpayer, died on January 4, 1949 and your petitioner, Edward Halle, thereafter qualified in the Surrogates Court of the State of New York, New

York County, as executor under his last will and testament. By Order dated March 14, 1949, signed by Honorable Charles E. Clark, Judge of the United States Court of Appeals, Second Circuit, your petitioner was substituted as party petitioner in his representative capacity as executor and the title of the matter was amended accordingly. Thereafter the appeal was argued and on June 1, 1949, the Court of Appeals, Second Circuit affirmed the decision of the Tax Court as aforesaid. Your petitioner moved for rehearing in the matter and on July 1, 1949 the said petition for rehearing was denied without opinion. Thereafter upon application made to this Court an Order was signed by Mr. Justice Jackson on September 12, 1949 extending the time for filing a petition for Writ of Certiorari to and including November 26, 1949.

I.

Opinions Below.

The opinion of the Tax Court, 7 TC 245, promulgated on June 27, 1946 is set forth in pages 52-62 of the printed transcript of record presented herewith. A copy of the opinion of the Court of Appeals for the Second Circuit, 175 F. 2d 500, is annexed to the additional papers certified to this Court.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1141 of Title 26 of the U. S. Code and Section 1254 of Title 28 of the U. S. Code.

III.

Statutes and Rules Involved.

TITLE 26, SECTION 1112 UNITED STATES CODE.

BURDEN OF PROOF IN FRAUD CASES.

"In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner."

RULE 32 OF THE RULES OF PRACTICE BEFORE THE TAX COURT OF THE UNITED STATES.
BURDEN OF PROOF.

"The burden of proof shall be upon the petitioner, except as otherwise provided by statute, and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent."

TITLE 26, SECTION 275 UNITED STATES CODE.
PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

"(a) GENERAL RULE. The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

"(c) OMISSION FROM GROSS INCOME. If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed."

TITLE 26, SECTION 1117 (e) UNITED STATES CODE.

EFFECT OF DECISION THAT TAX IS BARRED BY LIMITATION.

"If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax."

IV.

Some Facts Concerning the Prior Proceedings Had Herein.

The hearings before the Tax Court took place on November 20 and 21, 1944 before Judge Sternhagen (R. pp. 2, 77). This hearing resulted in 272 pages of typewritten testimony and the introduction of more than a thousand sheets of exhibits. On May 10, 1946, more than eighteen months after the hearing and before an opinion had been rendered by Judge Sternhagen, the matter was transferred to Judge Murdock (R. p. 1) who had had no prior connection with the proceedings. On June 27, 1946 findings of fact and opinion were rendered by Judge Murdock.

The computation of the revenue agent which was used in setting up the alleged deficiencies, as contained in Respondent's Exhibit GG, was received by the court, not as evidence, but merely as a method of computation with no significance of its own as evidence (R. p. 235). An examination of the file in the Tax Court reveals a lengthy brief submitted on behalf of petitioner pointing out many and varied discrepancies in the revenue agent's computation. Nevertheless, with one exception to be discussed later, Judge Murdock, with no discussion of the petitioner's many contentions of error in the computa-

tion, "rubber-stamped" the exact figures of the commissioner and incorporated them in his decision. Further, Judge Murdock, who had never seen a witness in this matter, found fraud as a matter of fact, based only on the presumed deficiencies as set forth by the commissioner. Again, before the Court of Appeals, counsel for petitioner both in brief and argument pointed out gross errors in the revenue agent's computation and again the Court of Appeals did not discuss these many errors, *which incidentally were not disputed by the Government* in brief or argument.

The Court of Appeals similarly found that the deficiencies were proven on the presumption of correctness of the commissioner's figures and that because such presumptive deficiencies were so large, the returns must have been fraudulent.

The backbone of petitioner's contention herein is that fraud cannot be proven by presumption. The errors in the revenue agent's computations, which were pointed out to both Courts below, are so many and so varied that an affirmation of the commissioner's figures by both courts indicates a complete lack of consideration of the petitioner's arguments in rebuttal of the commissioner's figures in the evidence. Of course, it may be a tedious matter to study ten years of bank statements and accounts, but, by the same token, it is respectfully submitted that the interests of justice may be served only after a painstaking examination and inspection of the evidence in this matter. The opinions of both Courts below indicate that a detailed examination of the evidence, the greater part of which was admitted subject to correction, was not made. Both Courts rather relied on the convenience of the presumptive correctness of the commissioner's figures and ignored the arguments of counsel for the petitioner which were intended to aid the Courts and simplify such examination of the evidence. In view of

the "rubber-stamp" type of decisions which were made in both lower Courts, the petitioner respectfully prays this Court to examine the evidence with particular reference to those portions outlined in this petition. The petitioner feels confident that the Court will discover so many glaring errors that certiorari will be granted to review this matter.

V.

Statement of the Matters Involved.

A.

Concerning the Petitioner.

Your petitioner is the son of Louis Halle, deceased, and is carrying this matter on as personal representative in the place and stead of his father, who is no longer here to be heard. With the Court's indulgence, for the purposes of clarity in the ensuing portions of this petition and the brief annexed hereto, the word "petitioner" will be used to identify the original petitioner in this matter, namely, Louis Halle, the deceased taxpayer.

B.

Facts.

Petitioner was an attorney. During the period of national prohibition which was coincident with the first years involved herein to and including 1933, the petitioner earned substantial sums of money as fees from his clients among whom were alleged violators of the prohibition law. Together with such sums earned as fees, petitioner would receive from these clients additional large amounts to be used for various disbursements, including payments of fines and penalties, maintenance of crews of boats while

awaiting trial, moneys with which to purchase securities for deposit for collateral bonds to release of boats seized pending further legal proceedings and to pay bail bond premiums for members of crews arrested. These additional moneys belonged to petitioner's clients and were not his funds or income. At times these funds belonging to petitioner's clients were deposited in his own bank accounts pending their use for the purpose of paying expenditures as outlined above for his clients and on their behalf (R. pp. 117, 122-126; see also Pet. Ex. 1).

Although prohibition ended in December 1933 and petitioner's income from these clients fell off sharply*, a portion of this type of business still remained in petitioner's office since the alleged violations continued notwithstanding the repeal of prohibition (R. p. 130).

Since the Commissioner's determinations herein were largely based on the arbitrary inclusion of deposits which petitioner's wife made to her bank and brokerage accounts during the years in question, as well as income which petitioner's wife earned on her sole investments and reported in her individual income tax returns, the following facts became pertinent:

Petitioner married on July 5, 1914 (R. p. 95). Before marriage his wife was gainfully employed as a school teacher (R. p. 206); she did not engage in any occupation after marriage except that the housewife (R. p. 95). She had money of her own when they were married (R. pp. 96, 205, 206). Petitioner gave his wife money for household expenses and also additional gifts during the years 1914 through 1928, which she managed and controlled as her own funds thereafter (R. pp. 96, 109, 127, 198, 202,

*The following is a table of petitioner's net income as reported on his returns for the years in question:

1929	$25,600.56	(R. p. 11)	1934	$6,500.38	(R. p. 22)
1930	27,785.67	(R. p. 13)	1935	6,922.12	(R. p. 25)
1931	28,497.67	(R. p. 15)	1936 net loss	($2,451.44)	(R. p. 27)
1932	17,809.68	(R. p. 17)	1937	6,223.06	(R. p. 29)
1933	16,778.68	(R. p. 19)	1938	7,926.63	(R. p. 32)

265). These additional funds which came from petitioner during the years prior to 1929 were naturally in addition to such funds as petitioner's wife had had at the date of her marriage.

As an indication of the amount of funds which petitioner's wife received during each of these years, reference to Respondent's Exhibit EE shows that between January 31 and December 29, 1928 she deposited $6,426.85 to her Special Interest Deposit savings account No. 8293 at the Pennsylvania Exchange Bank. In addition to these funds she also had dividends and interest on the moneys which she invested from her savings and gifts which accumulated before 1929. Naturally, petitioner continued during the years 1929 through 1938 to supply his wife with household funds and gifts when he was able (R. p. 127).

Petitioner's wife kept her cash funds in bank accounts and also in a vault (R. p. 205). During the period when petitioner's business fell off, there were occasions when he received financial assistance from his wife, but he did not have a running account with her. At times she refused to give him money. There was never any agreement between them that any part of any bank account or any brokerage account belonging to her would belong to the petitioner, and there was never any agreement or understanding that she would give petitioner any part of her funds (R. pp. 127, 265, 266). After the repeal of prohibition, when petitioner's earnings dropped, his wife sold securities from time to time to use for running her home, for clothing and for medical expenses (R. p. 196). The earnings which she had were hers and she used them as she saw fit (R. p. 265). Petitioner never received any bonds or securities from his wife (R. p. 264).

In 1929 petitioner's wife opened a brokerage account with Kidder Peabody & Co. (Respt.'s Exh. P). The account was opened with monies from her savings or monies

which she received from petitioner; she never kept her funds separately to show how much came from petitioner since she considered and treated all money in her possession as her own (R. p. 194). Subsequent monies which were thereafter deposited to her brokerage account came from either her savings accounts, from her vault, or from the petitioner (R. p. 198).

She met a customer's lady from the brokerage house who assisted her in starting the account (R. pp. 194, 196). This woman would call her up to give her advice, and Mrs. Halle would act on this advice (R. p. 196). She had control of her brokerage accounts; they were in her name, and petitioner had no power to trade in those accounts, nor did he have any interest in her brokerage accounts (R. pp. 249, 264-266). Her account with Kidder Peabody & Co. was maintained on and off until the end of 1931 (Respt.'s Exh. P). From 1931 through 1938 her brokerage account was with G. M. P. Murphy & Co. (Respt.'s Exh. O).

C.

The Commissioner's Method of Computing the Deficiencies Herein and His "Proof" of Fraud.

The method of computing the deficiencies and the "proof" of fraud are included under one heading, since both the method and the proof are synonymous. By that we mean that the Commissioner claimed that proof of fraud was established by his computations alleging a large deficiency of petitioner's business income for each year. *These alleged deficiencies were not established by the clear and convincing evidence traditionally necessary to prove fraud, but rather by an arbitrary accounting method supported solely by the presumptive correctness of the Commissioner's alleged deficiency figures.*

The purported deficiencies in petitioner's income tax for the various years in question were computed by the

Commissioner, through Internal Revenue Agent Irwin L. Jacobs, by totalling all deposits made to all bank and brokerage accounts of both petitioner and his wife for each year. From these aggregates he then subtracted items, such as inter-bank transactions, sums representing deposits of bond interest coupons and interest credits from savings banks, in order to eliminate deposits which were not business income of the petitioner. These computations comprise Respondent's Exhibit GG (R. pp. 231-236).

The resultant totals would then allegedly represent petitioner's gross income from business (law practice) for the years in question. The agent thereupon subtracted from each of his statistics the amount of gross income from business for each individual year as reported by petitioner and arrived at annual figures which he denominated as "Gross Income from Business not Reported" (Respt.'s Exh. GG).

It was on this single annual item alone that the Commissioner relied to prove fraud (R. p. 59).

Mr. Clark, the Department's attorney, offered these sheets reflecting the agent's computations as Respondent's Exhibit GG in the following manner (R. p. 235):

> "Mr. Clark: • • •
>
> Now, we offer these schedules for the guidance of the Court and the parties in this case.
>
> Mr. Cahill: Is it offered merely as a computation of facts in evidence?
>
> Mr. Clark: That is all, as a computation.
>
> The Court: It has no significance of its own, then, as evidence?
>
> Mr. Clark: It is not, of course, the original entries. It is the method that was used in setting up the additional income.
>
> The Court: Any objection?
>
> Mr. Cahill: No, sir, not in that respect."

Mr. Jacobs freely admitted that when he was in doubt concerning the elimination of an inter-bank transaction that he resolved the doubt against the petitioner and included the item as income (R. p. 236).

The computations of the revenue agent may have served to eliminate from the grand total some of the deposits which represented dividends, interest on bonds or from savings accounts. We use the word "may" because many of the deposits of bond coupons and dividends on stock were not eliminated from the computations, due to either careless or deliberate acts of Mr. Jacobs in compiling his statistics from the actual real evidence which was introduced in the matter, as will be printed below in the discussion of Exhibit GG.

But even assuming *arguendo* that Jacobs eliminated all income other than the petitioner's business income in determining the item, "Gross Income from Business not Reported", the fact remains that there was added to the total deficiency figures in the 90 day letter (R. pp. 9 *et seq.*) all of the amounts of income which petitioner's wife earned on her own investments and on which she reported and paid her individual income tax, in spite of the fact that Jacobs knew that she had filed returns, that he had examined them, and that he presumed they were correct (R. p. 188).

D.

Discussion of Respondent's Exhibit GG.

Exhibit GG is the computation referred to above which was relied upon by the Commissioner to show his method of arriving at the deficiency figures. It is not evidence in and of itself of the particular amount of any deficiency; its use is restricted to that of a guide for computing the figures as found from the actual evidence in the Record, be it exhibit or testimony (R. p. 235).

Nevertheless, the Tax Court as affirmed by the Court of Appeals apparently used Exhibit GG in its entirety, with one exception, in its findings of fact of "Additional Income from Business not Reported" (R. p. 56). The exception is the year 1934,* where the court apparently deducted the amount of the Louis Halle special account totaling $49,149.90. The following table comparing the figures from Exhibit GG and the findings of the Tax Court with relation to gross income from business not reported is conclusive that the court found its facts directly from Exhibit GG:

Year	*Figures From Exhibit GG*	*Figures in Tax Court's Findings of Fact*
1929	51,750.87	51,750.87
1930	139,069.72	139,069.72
1931	166,056.53	166,056.53
1932	100,222.45	100,222.45
1933	36,138.59	36,138.59
1934	97,637.67*	48,487.77*
1935	50,268.10	50,268.10
1936	41,873.23	41,873.23
1937	36,251.70	36,251.70
1938	27,755.62	27,755.62

If the figures from Exhibit GG truly reflected the evidence in the Record, we should find no fault with the court's findings. However, it will be demonstrated below that Exhibit GG is inaccurate as a compilation of the evidence of the case. It is apparent, therefore, that the Tax Court, and the Court of Appeals, did not exercise independent judgment of the evidence but actually took the amounts as shown by the respondent as being presumptively correct with the one exception noted. The Tax Court itself in its opinion affirms that it went no further than to consider the Commissioner's figures presump-

tively correct by stating that it could not disturb the presumption of the correctness of his determination and that the taxpayer loses the deficiency issues for complete failure of proof (R. pp. 56-57).

In this connection petitioner is at a loss to reconcile the court's statement that the taxpayer loses for complete lack of proof, with the court's act in eliminating the $49,149.90 for the year 1934, unless it was done as result of the "two concessions made by the respondent which have been taken into account in the findings of fact", as stated by the court (R. p. 57). The findings in and of themselves do not define what concessions were made. If this item was eliminated because of a concession of the respondent, then certainly the court considered the balance of the deficiency presumptively correct. If it were eliminated because of proofs put in by the petitioner, then the taxpayer could not have lost the deficiency issues for complete failure of proof. Be that as it may, it is the contention of petitioner herein that the Tax Court did not decide the deficiency issues on evaluation of the evidence but merely held that the Commissioner's presumption for correctness was not rebutted by the petitioner.

Exhibit GG, which the Tax Court used exclusively in its alleged findings of fact, did not reflect the alleged evidence concerning petitioner's income as was aduced by the respondent and was further rebutted by evidence of the petitioner. A detailed analysis of the many errors in Exhibit GG is in order at this point. To avoid overburdening this petition, such detailed analysis has been prepared and annexed hereto and made a part hereof.* It is most respectfully submitted that a study of the analysis, shows that the presumption of correctness of the commissioner's figures was conclusively rebutted.

*Set forth at pages 20-27, *infra*.

E.

No Proof of the Net Worth of the Petitioner or His Wife Was Established for Any of the Years in Question.

The Commissioner and the Courts below have placed much reliance on the fact that in the year 1930 the petitioner's wife deposited a large sum of money to her brokerage account. The inference sought to be created is that this amount was income to the petitioner which was not declared in his tax return. In order to prove this, it is incumbent upon the commissioner to show that the money could only have come from the petitioner's current earnings and income for the year 1930.

Although deficiencies were determined for a period of ten years, no net worth statement of either the petitioner or his wife was offered by the commissioner for any of the years in question. On the other hand, both the petitioner and his wife showed in their testimony, which was borne out by the exhibits, that there were funds available to them before January 1, 1929 together with the individual income reported by the petitioner alone for the years 1929 and 1930, which were more than ample to cover those amounts which the petitioner's wife deposited to her brokerage account in the year 1930.

The 1929 individual income tax return of the petitioner (Respt.'s Exh. B) shows a sale of securities. After deducting the profit therefrom, we find a net of ..... $ 9,800.00
representing capital investment.

Respondent's Exhibit EE showed deposits to a single bank account of petitioner's wife in 1928 of ..... $ 6,426.85

Net income disclosed in petitioner's individual income tax returns for 1929 and 1930 totals $53,386.23

making a grand total of $69,613.08

To this must be added undetermined sums of money which petitioner's wife testified she had saved out of her earnings, wedding gifts, household monies and gifts from her husband during the years 1914 through 1928, as well as her personal income for 1929 and 1930. Judging from deposit of over $6,000 in 1928 alone, this additional sum could easily exceed $50,000.

F.

Findings of Fact in the Tax Court's Opinion Which Have No Warrant in the Record.

The Tax Court stated that the petitioner merely alleged and testified that his returns were correct as filed (R. pp. 53, 56). A review of the testimony which comprises more than 200 pages of the printed Transcript of Record herein shows conclusively that the taxpayer testified at length concerning various aspects of his contentions and that his testimony was corroborated by his wife, as well as by the exhibits.

The Tax Court found that petitioner and his wife filed joint returns for 1929, 1936 and 1937. This is not substantiated by the Record, since inspection of the income tax returns in evidence shows that the only joint returns filed were for the years 1936 and 1937. Returns for the other years from 1929 to 1938 were all individual returns of the petitioner.

The Tax Court found that the petitioner spent more than $23,500 for living and other family expenses during 1934 (R. p. 54). There is absolutely no evidence in the Record to substantiate this finding.

There is further no evidence in the Record which would warrant the court's finding of additional income from business not reported (R. p. 56) other than the presumption of correctness which the court accorded to the Commissioner's figures, especially as shown on Exhibit GG.

There is certainly no warrant in the Record for the court's finding that a part of the deficiency in each year was due to fraud in an attempt to evade tax (R. p. 56). This finding was predicated solely on the alleged deficiencies of business income not reported (R. p. 59), and therefore not found by the Tax Court as fact but was a finding of fraud based merely on the presumption of the Commissioner.

VI.

Questions Presented for Review.

1. Is it reversible error to find fraud as a fact based merely on the *legal presumption* that the Commissioner's determinations of deficiencies are correct, when the burden of proof of fraud is placed on the Commissioner by statute?

2. Is it reversible error to find that petitioner's motion, made in open court, to enter the plea of Limitations did not serve to create an issue merely because not reduced to writing even though the Court accepted and granted the oral motion?

3. Is it reversible error to sustain the validity of the Commissioner's *presumption* of correctness, when the deficiency arbitrarily includes as petitioner's income dividends and interest which petitioner's wife earned from investments of her sole funds and reported in her individual income tax returns?

4. Is it reversible error to sustain the *legal presumption* that the Commissioner's determinations of deficiencies are correct, where such determinations arbitrarily include as income of petitioner sums of money deposited by his wife in her individual bank and brokerage accounts?

5. Does the *presumption* in favor of the Commissioner's determinations become inoperative where he arbitrarily designated all deposits to an attorney's bank accounts as income when the attorney's rebuttal evidence disclosed that large amounts of these deposits belonged to his various clients, and were not income?

6. May a judge who has not heard the evidence or viewed the witnesses find fraud on the basis of a record heard and presented before another judge?

VII.

Reasons Relied on for Allowance of Writ.

In the decision sought to be reviewed, both the Tax Court and the Court of Appeals have set a precedent whereby the Commissioner of Internal Revenue may sustain his burden of proof for fraud merely upon the presumption of the correctness of his computations. This decision is contrary to the accepted rule as set forth in the reported decisions of other circuit and district courts and is likewise in conflict with applicable decisions of this Honorable Court. If this decision remains as a precedent, the Commissioner of Internal Revenue may aggregate the bank deposits of taxpayers for years barred by applicable Statutes of Limitations and if the deposits exceed the net amount of income reported, the commissioner may declare a deficiency and seek to prove fraud by *presumption* avoiding the Statute of Limitations. The

burden may be thus placed upon the taxpayer to come forward after some ten to fifteen years to explain each item of his income at a time when he may no longer have the proof to do so. Such was the situation in this case.

This decision implies that a taxpayer will have to keep detailed records of every business transaction from the time that he starts earning money until the day he dies. If such were the case, Congress never would have provided for Statutes of Limitations. In the instant case the alleged deficiencies for the years 1929-1935, inclusive, should have been barred by such limitations.

The decision sought to be reviewed, if permitted to stand uncorrected, would permit the Commisioner of Internal Revenue to obtain fraud judgments against taxpayers without the necessity of even proving a *prima facie* case in fraud.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to the United States Court of Appeals for the Second Circuit, commanding that court to certify and send to this court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as this court shall deem meet under the circumstances of the case, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem just and proper.

Dated: November 23, 1949.

EDWARD HALLE,
Executor of the Estate of Louis Halle,
Deceased, Petitioner.

STATE OF NEW YORK,
CITY OF NEW YORK, } ss.:
COUNTY OF NEW YORK.

EDWARD HALLE, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and the analysis of Exhibit GG hereinafter appended and knows the contents thereof; that the same is true to his knowledge, information and belief.

EDWARD HALLE.

Sworn to before me this
23rd day of Nov., 1949.

PHILIP F. HALLE,
Notary Public,

State of New York.

No. 24-1640200;
Qualified in Kings County;
Cert. Filed in New York County Clerk's;
Commission Expires March 30, 1951.

I hereby certify that the foregoing Petition for Writ of Certiorari, in my opinion, is well founded and should be granted by this Honorable Court.

EDWARD HALLE.

Analysis of Respondent's Exhibit GG Showing Many and Varied Errors on the Part of the Revenue Agent, Annexed to Petition.

Sheet 1929, Respondent's Exhibit GG, lists total deposits for Ethel F. Halle in the Pennsylvania Exchange Bank, account No. 8293, as $5,413.41 and total deposits in her checking account in the same bank as $10,901.38. In adding these deposits to the gross income of the petitioner, the Commissioner deducted inter-bank transactions of moneys which were deposited to the checking account from account No. 8293 which was a special interest deposit account or savings account (see Respt.'s Exh. EE) in the amount of $951.38 (Respt.'s Exh. GG).

An analysis of Respondent's Exhibit EE which purports to show the deposits to both of the mentioned accounts shows that on May 9, 1929 petitioner's wife deposited $1,400 in cash to the special interest deposit account No. 8293, and that on the same date she deposited a check for $1,400 in her checking account. A check of Respondent's Exhibit CC which contains eight original deposit slips for the checking account in 1929 shows the deposit slip to the checking account for May 9, 1929 for $1,400 marked "S. I. D." This is obviously a transfer of this amount from the special interest deposit account to the checking account, which was not reflected in the revenue agent's computations, as shown on Respondent's Exhibit EE, and was not included in the total of inter-bank transfers for that checking account, as shown on Respondent's Exhibit GG. With particular reference to this item, when the slips were introduced into evidence petitioner's attorney asked Mr. Jacobs, the revenue agent, concerning the notation on the deposit slip referring to it as "8 I. D." (R. p. 153). Mr. Jacobs replied, "You read that incorrectly, Mr. Cahill. It should be 'S. I. D.' 'Special Interest Department'" (R. p. 154).

Thus, the government witness was shown that specific deposit slip at the hearing. He identified the notation as showing a transfer from the special interest department to the checking account. Yet, he did not volunteer at that time to correct his computations. We may assume that the Commissioner's error in this respect, therefore, was not merely inadvertent, which would have been surely enough to rebut the presumption of correctness, but was actually deliberate on the part of the revenue agent, since he did not correct his figures when this was called to his attention at the hearing. It is on the basis of this type of evidence that the Tax Court found that the Commissioner's determinations were correct and that his presumption survived petitioner's attack for complete lack of proof on petitioner's part.

Exhibit GG, Sheet 1931, shows that the Commissioner was originally in error in coming to his figures because of the inclusion of the bank account of a person not connected with the petitioner (see note 3 thereon). It is to be noted that the Internal Revenue Agent, in including this bank account, originally did not question the petitioner concerning its existence and just threw it in because of the similarity of names (R. pp. 233, 249, 250).

Exhibit GG, for the year 1932, shows that Mrs. Halle deposited to J. R. Williston & Co. $660, as taken from Exhibit Q, a copy of her brokerage account with that company for that year. However, Exhibit GG does not reflect the full information concerning Mrs. Halle's Williston account. The only amount deposited to the Williston account by Mrs. Halle in 1932 was the aforesaid amount of $660 which was deposited on December 9th. The computation does not show that on August 29, 1932, Mrs. Halle withdrew from the Williston account a check for $228.92 (Exh. Q) which she deposited on the same day to her Central Savings Bank Account (Exh. U). The significance of this transaction is that it reduces the amount deposited

to Williston by that sum and also reduces the gross amount of her deposits to the Central Savings Bank by the same amount. Although under the column headed Central Savings Bank (Exh. GG, 1932) the sum of $6,115.50 was deducted from the gross amount as being inter-bank transactions, Note (1) to the 1932 sheet of Exhibit GG shows that all of the inter-bank transactions deducted came from G. M. P. Murphy & Co., another brokerage account of petitioner's wife. It is, therefore, apparent that this sum of $228.92 was not included in the inter-bank transaction figure, since it did not come from G. M. P. Murphy & Co. but came from J. H. Williston & Co. Thus, the gross figures from the 1932 computation of Exhibit GG include an additional amount of $228.92 for both the Williston account and the Central Savings account of petitioner's wife. In this one instance a single item which was not income at all to the petitioner has been doubled up to reflect twice its amount as gross income of the petitioner understated. In view of the fact that this item was a check item which could be traced from the Williston to the Central Savings account, we have been able to bring it to the attention of this court. We cannot state how many other items of similar nature which could not be so traced and which were not income to the petitioner were similarly added up and added as gross income of the petitioner. This one item alone is sufficient to rebut the correctness of the Commissioner's figures. However, since this is a fraud case, the burden is not upon the petitioner to show every transaction. The burden is upon the Commissioner to clearly show income.

Also for 1932 in the petitioner's account of J. H. Williston & Co. we have a gross item added to income of $4,667.50, which the Commissioner claims was deposited to that account by the petitioner. The Commissioner neglects, however, to show that the sum of $883.62 was with-

drawn from that account on August 25, 1932 by check payable to the petitioner (Exh. Q). This further rebuts the correctness of Commissioner's figures for 1932.

In this connection counsel should like to quote the following from the record from the testimony of Irving J. Jacobs, the revenue agent who compiled these computations, during his cross-examination by petitioner's counsel:

> "Q. We have had some testimony and summaries by you, Mr. Jacobs, as to deposits in the name of Ethel Halle and Louis Halle in brokerage accounts? A. Yes.
>
> Q. Did you also check the withdrawals from those accounts? A. I did.
>
> Q. Have you got a list of these withdrawals? A. I have.
>
> Q. May I see them? A. If Mr.——
>
> Mr. Clark: Your Honor, the accounts are in evidence here, and I would refer counsel to the accounts in evidence.
>
> Mr. Cahill: I do not believe the full accounts are in, are they?
>
> Mr. Clark: As far as I know, they are. I would be glad if you can show me where they are not.
>
> Mr. Cahill: Well, I will look at them later so as not to delay the Court, and I will ask another question or two" (R. pp. 180, 181).

Mr. Jacobs knew that there were withdrawals from these acounts. He knew it because the accounts in evidence reflected such withdrawals. Yet, in making up his computation for the Tax Court he not only increased petitioner's income by the amounts of these withdrawals, which were obviously not income to the petitioner, but probably also included the same amounts in other accounts

of the petitioner without marking them as inter-bank transfers. Since he knew there were such withdrawals and since they were not included on the 1932 sheet of Exhibit GG, we may assume that this was deliberate on his part and that the Commissioner's presumption falls not merely for incorrectness but also because his agent probably padded the account to show increased income which was not warranted in fact. This is not the case where the agent was doubtful and included an amount as income which he could not otherwise explain but rather was a case of including something deliberately which the agent knew was not income.

The 1934 sheet of Exhibit GG shows an item on the Louis Halle Pennsylvania Exchange Bank of $594 for "bank loans" which was deducted and eliminated as not being income. This is the only heading on the sheet with reference to that account which shows any bank charge; yet, Mr. Jacobs, on his direct testimony, testified that in 1934 the total bank charges for loans by the Pennsylvania Exchange Bank against the account of the petitioner was $3,332.47 (R. pp. 165, 166). It is submitted that this amount of bank charges for loans should have been eliminated from the computations of the Pennsylvania Exchange Bank account in 1934 instead of the figure $594 if the Commissioner purports to be consistent in his alleged computations.

Further on in Exhibit GG, for the year 1934, the Commissioner lists the total deposits in the Ethel Halle Corn Exchange Bank account as $40,586.65. There is no basis in the evidence which was received to show that such a figure existed. The following exhibits in evidence are the only ones from which such a figure could be determined:

(1) Exhibit W, which contains Mrs. Halle's deposit slips in the Corn Exchange Bank;

(2) Exhibit V, the bank ledger of the Corn Exchange account.

Exhibit W contains only two deposit slips for 1934 and the total deposits indicated thereon are $13,232.23. One of these slips, by the way, reflects a check which she drew from her G. M. P. Murphy account in the amount of $13,157.23 from the sale of shares of American Telephone and Telegraph stock (Respt.'s Exh. O), which clearly is not income to the petitioner.

Exhibit V only covers the year 1934 from June 23rd through December, and shows a total of deposits of $20,289.89, which, of course, includes the figure of $13,232.23, as shown on the two deposit slips. Since this is the only evidence in the Record from which the amount of Mrs. Halle's deposits in the Corn Exchange Bank for 1934 can be determined, it is patent that there is no basis in the Record for the figure of over $40,000 as shown on Exhibit GG, sheet 1934.

In the year 1935 the Commissioner showed that Mrs. Halle deposited to her Corn Exchange Bank account the sum of $20,333.25, of which the sum of $17,353.50 was labelled as unidentified deposits because of the fact that the deposit slips were not available (see note 1 to 1935 sheet of Exhibit GG).* This is perhaps the most glaring error of the Commissioner's case, since all of these deposit slips are available as contained in Exhibit W, and each one of them shows the nature of the deposit. Many of them were deposits of bond coupons which were income to the petitioner's wife, and at least one of them was a deposit of an amount which she withdraw from her brokerage account. Several were checks transferred to her account from the Pennsylvania Exchange Bank account of petitioner, which should have been deducted as inter-bank transfers, and an analysis of the deposits shows that

*"(1) Unable to determine cash deposits inasmuch as deposit slips unavailable."

many of them were checks which she received as dividends on her stockholdings.

Yet, all of these were added to the petitioner's gross income with the simple statement that the Commissioner was unable to determine what they included since the deposit slips were not available. This is an obvious falsehood on the part of the revenue agent who prepared the Commissioner's Exhibit GG.

For 1936 the Commissioner shows that Mrs. Halle deposited $17,766.89 to her Corn Exchange Bank account, and that $7,618.40 of these deposits were not identified as to source. The balance was identified as being inter-bank transfers. An analysis of the deposit slips for 1936 shows that at least $1,430.00 of her deposits for that year were deposits upon coupons and at least $540 was a deposit of a commercial credit dividend which was made on December 16, 1936; that $1,900 of the deposits was cash. Yet, although there are headings on the sheet to show cash deposits and bond coupons, these spaces are blank and do not reflect such deposit of bond coupons and cash. It is, therefore, apparent that the figures contained in the column, "Corn Exchange Bank, Ethel Halle", on Exhibit GG for 1936, are incorrect and that the petitioner's presumption for that year falls.

With regard to 1937, the total amount deposited to Ethel Halle's Corn Exchange Bank account is listed as $13,917.99. From this was deducted the figure of $9,-648.38, representing inter-bank transfers, which left an amount of $4,269.61 labelled "Other Deposits not Identified as to Source", which was added to the figures to implement the petitioner's gross income from his business. All Mr. Jacobs had to do would be to refer to the deposit slips in Exhibit W for that year to find an amount totalling $2,345.00 which was deposited by Mrs. Halle and marked "coupons". The interest represented by these bond coupons certainly was identifiable and should

have been eliminated if Exhibit GG is an accurate reflection of the evidence. By this we are not conceding that any of Mrs. Halle's funds were properly added to petitioner's gross income. We are just stating that the Commissioner, even though incorrect in his assumptions, was not consistent in carrying through his alleged computation.

The compilation of the deposits to the petitioner's Pennsylvania Exchange Bank account for 1937 totals over $40,000 from which no interbank transfers are deducted, yet the transfer of more than $13,000 from Mrs. Halle's G. M. P. Murphy account (Respt.'s Exh. O) to the petitioner's mentioned bank account (Respt.'s Exh. T) can be traced by examining the respective exhibits. By omitting to put these substantial figures into the computation of Exhibit GG the Commissioner increased his presumptive findings of deficiency by over $13,000 for 1937 alone.

For the year 1938, Mrs. Halle's Corn Exchange Bank account of $4,345.28, was added to the computation in allegedly determining the petitioner's gross income from business. Bond coupons in the amount of $1,830.00 were deposited to her account which should have been included in the Commissioner's computations and deducted from the $4,345.28. Further, a check of the inter-bank transfers which can be determined from the deposit slips, Exhibit W, shows that they total more than the $16,174.33 which was deducted.

Supreme Court of the United States

EDWARD HALLE, as executor of the estate of
LOUIS HALLE, deceased,

Petitioner,

AGAINST

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF ON BEHALF OF PETITIONER.

POINT I.

The findings of fraud by both the Tax Court and the Court of Appeals constituted reversible error since neither Court exercised its independent judgment on the evidence of record but merely "rubber stamped" the presumed deficiencies in income tax and 50% additions thereto for fraud, as determined by the Commissioner.

Findings of fraud with intent to evade tax and 50% penalties therefor can be based only on a valid proven deficiency in income tax. If there is no deficiency, there can be no fraud. In order to sustain a fraud determination the Commissioner must, first, prove a deficiency, and, secondly, prove that at least a part of that deficiency resulted from the taxpayer's intent to fraudulently evade the payment of income tax. It is only with reference to his first task that the Commissioner has the presumption

of correctness which places the burden of rebuttal upon the taxpayer. With regard to the second task, namely, that of proving fraud, the burden is always on the Commissioner.

> Title 26 U. S. C. 1112;
> Tax Court Rule 32;
> *Mitchell* v. *Comm.*, 5 Cir., 118 F. (2d) 308;
> *Duffin* v. *Lucas*, 6 Cir., 55 F. (2d) 786;
> *Griffiths* v. *Commissioner*, 7 Cir., 50 F. (2d) 782;
> *Budd* v. *Commissioner*, 3 Cir., 43 F. (2d) 509;
> *Guaranty Trust Co.* v. *U. S.*, 44 F. S. 417;
> *Willets* v. *Commissioner*, 36 BTA 294;
> *Miller Pocahontas Coal Co.* v. *Comm.*, 21 BTA 1360.

It is well settled that the Commissioner may not prove fraud on the *presumption* that his determination of a deficiency was correct.

> *Vitelli & Son* v. *U. S.*, 250 U. S. 355, 39 S. Ct. 544, 63 L. Ed. 1028;
> *Griffiths* v. *Commissioner, supra*, p. 786;
> *Jemison* v. *Commissioner*, 5 Cir., 45 F. (2d) 4, 5;
> *Guaranty Trust Co.* v. *U. S., supra*, p. 419.

The Tax Court, in its opinion, showed that the Commissioner relied on the alleged deficiencies of petitioner's business income alone to prove fraud (R. p. 59). The Court of Appeals based the premise of its affirmance on the principle that:

> "The Commissioner's determination bears a presumption of correctness" (Opinion, pp. 1417; 175 F. 2d 500, 502).

Fraud may never be proved by a presumption. It must be determined from clear and convincing evidence, considering all the facts and circumstances of the case. The presumption of Commissioner's correctness does not extend to his determination that fraud existed. Findings of fraud under such circumstances is reversible error.

Marshall v. *Commissioner,* 57 F. 2d 633, 634;
Duffin v. *Lucas, supa;*
Griffiths v. *Commissioner, supra;*
Budd v. *Commissioner, supra;*
Taplin v. *Commissioner,* 6 Cir., 41 F. (2d) 454;
Maddas v. *Commissioner,* 40 BTA 572;
Willets v. *Commissioner, supra.*

Ordinarily the Commissioner's determinations of deficiency stand if unrebutted by the taxpayer. Thus, assuming *arguendo* that in this matter the Commisisoner's determinations were not rebutted and the presumption remained effective, the taxpayer would be liable for the deficiencies as found, without fraud penalties.

The petitioner's returns for the years 1929 through 1938 are all in evidence, and there is no contention that they were not filed at the proper time. The Commissioner's letter assessing deficiencies was mailed on September 29, 1943. Waivers were signed by the petitioner for the years 1936, 1937 and 1938. Therefore, while petitioner may not claim limitations as to these three later years, it is evident that in absence of fraud the period of limitations has run for the years 1929 through 1935 [Title 26 U. S. C. 275 (a), (c)]. After the period of limitations has run, no deficiency of tax can be found [Title 26 U. S. C. 1117 (e)].

Since the Commissioner failed to sustain his burden of proof as to fraud herein, the alleged deficiencies and

penalties for the years 1929 through 1935, inclusive, must be annulled as barred by the Statute of Limitations.

With regard to the years 1936, 1937 and 1938, it is contended that the *presumption* of correctness as to the Commissioner's determinations was sufficiently *rebutted* by the petitioner's evidence and by the exhibits so that the Tax Court should have redetermined the said deficiencies, if any, on the evidence without reliance on the presumption of correctness. Failure to do so constituted reversible error.

> *Helvering* v. *Taylor,* 293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 623;
> *Durkee* v. *Commissioner,* 6 Cir., 162 F. (2d) 184, 187;
> *Crude Oil Corp.* v. *Commissioner,* 10 Cir., 161 F. (2d) 809, 810;
> *Andrews* v. *Commissioner,* 2 Cir., 135 F. (2d) 314, 318;
> *Worcester County Tr. Co.* v. *Commissioner,* 1 Cir., 134 F. (2d) 578, 580;
> *Hague Estate* v. *Commissioner,* 2 Cir., 132 F. (2d) 775, 778.

Neither the Tax Court nor the Court of Appeals exerted its individual judgment but took the Commissioner's figures as presumptively correct and then found fraud. This is reversible error.

The Tax Court, towards the end of its opinion, seems to doubt its own decision and makes the following statement:

> "The respondent contends that he has fully sustained the burden of proof cast upon him and that he has made at least a *prima facie* case by clear and convincing proof" (R. p. 62).

A statement of this character in the opinion of a court which has found fraud as matter of fact and which has found that the Commissioner has sustained his burden of proof is indeed strange. It indicates that the court was under the mistaken belief that the Commissioner could sustain his burden of proof merely on the strength of the presumption that his determinations were correct. Thus, the Commissioner attempts to prove his *prima facie* case by putting in his figures and relying on their authenticity by presumption. It is then up to the petitioner to rebut the presumption, that is, where there is no allegation of fraud. In fraud the burden is on the Commissioner. The *prima facie* case of fraud may not be proven by an accounting statement alone.

The court further stated:

> "He (Commissioner) argues that the petitioner has failed to refute or rebut this evidence" (R. p. 62).

This last statement clinches the theory that the Tax Court decided the fraud issue on presumption and placed the entire burden on the petitioner, which is clearly contrary to law.

Further proof of the court's error is evidenced by the following statement:

> "He (the petitioner) has failed to show that any part of the deficiency herein was erroneous. Indeed, it is significant that he did not make a genuine effort to allege or prove facts to show any error on the part of the Commissioner" (R. p. 62).

The above excerpts demonstrate that the judge placed the entire burden to disprove the allegations of fraud on the petitioner herein.

The Court of Appeals lapsed into the same error. After determining that deficiencies existed by reason of the legal presumption of correctness the court found that the Commissioner had sustained his burden to prove fraud since:

> "The deficiencies here were too many, too varied, too continuous and too excessive to be plausibly attributed to inadvertence or carelessness. The transactions here involved were such in magnitude and importance that they could hardly have been overlooked by a prosperous New York lawyer; for all the facts, set in their proper background, simply cry out against any such inference" (Opinion, C. A., pp. 1419, 1420; 175 F. 2d 503).

There was no claim on the part of the petitioner that there were admitted deficiencies, but that they were due to carelessness rather than fraud. The petitioner definitely claims that there were no deficiencies. At best deficiencies were presumed and based thereon, fraud was presumed. It is interesting to note that in *Cohen* v. *Commissioner*, 176 F. 2d 394, the United States Court of Appeals for the Tenth Circuit is in apparent disagreement with the Second Circuit and substantiates the petitioner's contention by stating the rule, at page 401, that:

> "* * * the burden is upon the Commissioner to show fraud, and such burden is not sustained by merely establishing a deficiency."

The case of *Hague Estate* v. *Commissioner*, 2 Cir., 132 F. 2d 775, 778, has been relied on heavily by both lower courts for the proposition that bank deposits unexplained (even though taxpayer's lips closed by death) will support Tax Courts findings of deficiencies. However this was not a fraud case. The burden was on the

taxpayer not on the Commissioner and thus the ruling is inapplicable to the case at bar.

In *Helvering* v. *Taylor, supra,* decided by this Court on January 7, 1935, it was made clear that the burden of proof placed upon the taxpayer by Rule 30 of the Tax Court does not require the taxpayer to show the correct amount of tax to be paid. That burden is satisfied so long as the taxpayer showed the Commissioner's determination to be arbitrary and excessive. This Court stated in its opinion on page 515:

> "But, where as in this case the taxpayer's evidence shows the commissioner's determination to be arbitrary and excessive it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him. On the facts shown by the taxpayer in this case, the board should have held the apportionment arbitrary and the commissioner's determination invalid."

It is submitted that there was sufficient rebuttal herein to invalidate the Commissioner's arbitrary and presumptive determinations and hypothetical figures. The failure of the Court of Appeals to recognize this accomplished fact constituted reversible error.

Both the Tax Court (R. p. 60) and the Court of Appeals (Opinion, p. 1418; 175 F. 2d 503) depreciated the petitioner's sworn statement that his tax returns as filed were correct. This Court stated at page 513 of its opinion in *Helvering* v. *Taylor, supra,* that the various Federal statutes and regulations requiring returns to be filed support the taxpayer's contention that such returns as filed, are correct and may not arbitrarily be set at naught.

It is most respectfully submitted that this Court should grant certiorari herein to wipe out this dangerous precedent of "fraud by presumption". It is contrary to every statutory and legal safeguard promulgated by Congress and the Courts to protect the common taxpayer from the over-zealous tax collector.

POINT II.

Assuming, arguendo, that petitioner's living expenses in 1934 were $20,000, such figure is entirely consistent with a reported income of $6,500.38.

The Court of Appeals stated:

> "There was evidence tending to show that during the year 1934, when taxpayer returned an income of $6,500.38, his actual living expenses exceeded $20,000" (Opinion, p. 1416, 175 F. 2d. 502).

The record does not substantiate a finding in 1934 of $20,000 for living expenses, however, the following sums were available to petitioner's family for living expenses in that year:

Net Income Reported	$ 6,500.38
Loans to Petitioner from Pennsylvania Exchange Bank (testimony of Revenue Agent, R. pp. 165, 166)	3,332.47
Advanced to Petitioner by Wife (Respt.'s Exh. DD, Sheet 12	5,580.66
Withdrawn from Wife's Savings Accounts (Respt.'s Exhs. FF; U)	6,462.00
Withdrawals From Wife's Brokerage Account Over and Above Deposits (Respt.'s Exh. O)	11,723.50
Total	$33,599.01

The figure of $20,000 standing alone means nothing. In the case of *Bryan* v. *United States,* 175 F. 2d 223, 225, Circuit Judge Waller stated:

> "The net worth—expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned period can be reasonably accepted as accurate."

In the matter at bar net worth was not shown for any period. The issues were decided on hypothetical and inaccurate generalities.

POINT III.

The Commissioner's determinations of the total deficiencies herein were arbitrary in that they included all the amounts of income which petitioner's wife earned on her individual investments and on which she reported and paid her individual income tax.

It is fundamental that a married woman may have independent resources and that her income from her own property is taxable to her individually and not to her husband.

It is not illegal or even unethical for a husband to make gifts of money or property to his wife in spite of a purpose of relieving himself of the burden of paying tax on the income of his property (*Marshall* v. *Commissioner,* 57 Fed. (2d) 633, 635, 6 Cir. (1932), cert. den. 53 S. Ct. 20, 287 U. S. 621, 77 L. Ed. 539)

The Commissioner added to the petitioner's net income as a part of the deficiencies found amounts of income which petitioner's wife had reported on her individual

returns (R p. 188). The moneys which petitioner's wife held independently and any income that she may have enjoyed therefrom could not be construed to result in income to the petitioner (*George Washington Sr.* v. *Commissioner of Internal Revenue,* 36 BTA 74, 75; *Frank* v. *Commissioner of Internal Revenue,* 27 BTA 1158, 1159, 1165).

If Mrs. Halle at times accepted petitioner's advice and aid it did not make her income his income. This dependence of a wife upon her husband is not uncommon and is commendable (*Marshall* v. *Commissioner, supra,* p. 635).

POINT IV.

The Commissioner's determinations of the amounts of petitioner's business income not reported were arbitrary in that they included as petitioner's income deposits made by petitioner's wife to her individual bank and brokerage accounts for all the years in question.

The Commissioner arbitrarily included all unidentifiable deposits which petitioner's wife made to her bank and brokerage accounts as income to petitioner.

She was subpoenaed as a government witness, yet she had never been previously interviewed by the government (R. pp. 248, 249). She was called upon to testify with no advance indication as to what would be required of her. Her testimony given in 1944 covered a period of time from 1914 through 1938. She was asked what her assets were before 1930 and she stated that to the best of her knowledge she had had money of her own in banks and in a vault which she had saved from earnings before her marriage, her wedding gifts, her household moneys, and gifts from the petitioner. Her testimony was never rebutted or refuted and no attempt was made by the government to impeach or discredit her on the trial.

It is therefore apparent that the inclusion of her bank and brokerage deposits as income to the petitioner was arbitrary and rebuts the legal presumption of correctness attributable to the Commissioner's computations.

See, *Kirsh* v. *U. S.*, 174 F. 2d 595, 600, 601.

POINT V.

The Commissioner's determination of the amount of petitioner's business income not reported was further arbitrary in that it included all deposits made to petitioner's bank accounts, even though petitioner as an attorney held large sums of money of his clients' funds which he used solely for his clients and which did not constitute income to him.

This point needs little explanation. Even if petitioner has not testified as to the nature of his business transactions for his clients and to the fact that he received various sums of money for disbursements from his clients which moneys he actually disbursed on their behalf and were not received by him as fees, this court should surely take judicial notice that an attorney's usual business is representing other persons and that in the course of such practice many sums are both received and disbursed which belong not to the attorney but to his clients. Such of these sums as the attorney may receive as his fee are naturally income to him. But such sums as are disbursed for the client are not income to the attorney.

For example, in a transaction where the attorney posts collateral with a surety company for the release of a boat pending legal proceeding, if he receives $5,000 from his client to purchase bonds for collateral and $500 for his fee, even though both amounts are placed in his bank account only the $500 is income to him. His act in purchasing bonds with the $5,000 and placing same as collateral

with the surety company is a representative act for his client, the $5,000 at all times belonging to the client and being used for the client's benefit.

Unfortunately, in this case none of the original records of the many transactions survived the ten odd years between the transactions and the assessment by the Commissioner's deficiency letter. The petitioner was able to produce one exhibit in the amount of $33,837.86 representative of one of a series of these transactions (Pet. Exh. 1). The Commissioner, on the other hand, could not produce a single original exhibit concerning any of the petitioner's bank accounts from any of the banks prior to the year 1936, since the banks had destroyed them (R. pp. 140, 145). The only evidence to show petitioner's deposits in his banks before that time was secondary evidence taken from the bank records by the internal revenue agent, presumably at such time before the bank had destroyed the records (R. pp. 139, 145, 149-155). Surely, if the bank was not required to preserve the records, even though they were being investigated by the Internal Revenue Department, the petitioner was under no greater obligation. By this we do not mean to imply that the petitioner destroyed his records after the investigation started herein. The investigation started in the year 1940 (R. p. 163), at which time the petitioner gave the internal revenue agent all of his records which he then had from 1934 to 1938 (R. pp. 163, 176). At the time the investigation was first called to the attention of the petitioner he had moved his offices several times since the years in question and had already either lost or thrown out such records as he did have for the years up to 1934 (R. p. 132). Thus, when the investigation started the petitioner *did* have his records for at least six years back.

Since in this case the respondent relies on fraud to vitiate the statute of limitations for the year 1935 and all years prior thereto, it is respondent's burden to prove

the fraud. Congress provided in such case that the petitioner should not have the burden of disproving the charges to compensate for just such a situation as this where the matter is so stale that in the course of events petitioner no longer has his records for the old years upon which to base a defense.

In *Snell Isle Inc.* v. *Commissioner,* 90 Fed. (2d) 480, the court, at page 482, in discussing the statutory change by Congress in shifting the burden of fraud from the taxpayer to the Commissioner, stated:

> "Before the adoption of the statute, in many cases, overcoming of the presumption of fraud was not a hardship. Necessarily, if the taxpayer was able to prove the correctness of his return, the charge of fraud fell. On the other hand, if the taxpayer failed to adequately support his return and it was erroneous through ignorance in keeping his records or mistake of law or fact, it was extremely difficult to overcome an arbitrary imposition of penalties for fraud. Clearly it was the intention of Congress to relieve the taxpayer of his burden in cases where there was no actual fraud * * *."

POINT VI.

It is reversible error for a judge of the Tax Court to find fraud when he did not hear the evidence of the record or view the witnesses who testified.

The Record in this case discloses that the hearing was had before Judge Sternhagen, whereas Judge Murdock who did not hear the case made the findings of fact, wrote the opinion and entered the decision (R. pp. 2, 3). The hearings took place on November 20 and 21, 1944 before Judge Sternhagen (R. pp. 2, 77). They covered the two

days and resulted in 272 pages of typewritten testimony. The exhibits produced at the said hearing were voluminous. On May 10, 1946, the matter was transferred from Judge Sternhagen to Judge Murdock (R. p. 1).

Up to this point the Record does not show Judge Murdock as having any connection with the matter; yet having had the case transferred to him more than eighteen months after the hearing in which he did not participate, Judge Murdock held in his opinion, which he decided on a cold record, that the crux of the whole case, the issue of burden of proof of fraud, which was the subject of two days trial, was not an issue in the case because the oral motion made at the outset of the trial to enter the plea of limitations was not reduced to writing (R. pp. 57, 58). It is submitted that the oral motion, approved by the court without objection, was quite sufficient (*Cutcliffe* v. *Commissioner*, 163 F. 2d 891, 892). This illogical reasoning reflects the attitude of this judge and explains in some part why he found fraud as a "fact" and that the Commissioner sustained his burden of proof for fraud. Merely labeling the finding one of fact does not make it so, when it appears from the Record that it was a legal finding made on a series of legal presumptions (*C. I. R.* v. *National Carbide*, 2 Cir., 167 F. 2d 304, 307).

Specifically, it is the petitioner's contention that a judge of the Tax Court who did not hear the case and observe the witnesses cannot validly decide a fraud issue which carries with it such drastic consequences, not only in the pecuniary sense but also in the stigma attached to an adjudication of fraud against the government. This is clearly reversible error which entitled the petitioner in a fraud case to a new trial.

See:

S. Buchsbaun & Co. v. *Federal Trade Commission*, 143 Fed. (2d) 85.

It should be noted in this connection that in the recent case of *Elizabeth McDonald* v. *Commissioner,* Tax Court 6910, decided January 15, 1947, the Tax Court held that it did not come under the provisions of the Federal Administrative Procedures Act since it actually constituted a court, and was, therefore, not subject to the mentioned act. In this connection we should like to direct the court's attention to Chapter 704, Public Law, 567, which was approved by Congress on July 31, 1946 entitled "An Act to Fix the Salaries of Certain Judges of the United States." The Act lists judges whose salaries are affected thereby. The judges named therein are the Chief Justice of the United Sttaes, the Associate Justices of the Supreme Court, the Judges of the several Circuit Courts of Appeals the Judges of the United States Court of Customs and Patent Appeals, the Justices of the Court of Claims, the Judges of all the Federal District Courts, the Judges of the United States Customs Court and the *Judges of the Tax Court of the United States.*

It is respectfully submitted that this enactment by Congress carries the full implication that Congress at least, which created the Tax Court, considers it a court and has included its judges in the general salary increase along with all of the judges of the United States of America.

It is fundamental that where a judge of a court tries a case and for one reason or another is not available to write the opinion and make the decision thereon, another judge of that court may not make the decision on the cold record which he has not heard, without at least ordering a rehearing or obtaining the assent of the parties (*Foss* v. *C. I. R.,* 75 Fed. [2d] 326, 329).

Even if as in this situation there may be some doubt as to the Tax Court being a valid court, the fact that Judge Murdock did not hear the case but decided it on a cold record places him in no better position with reference to the evidence than is this court.

In *Jewett & Co.* v. *C. I. R.*, 61 Fed. (2d) 471, 2 Cir., a matter which was tried before the Board of Tax Appeals was appealed. While several members of the Board decided the case, the only member who heard any witnesses and received the evidence was the one member of the Board who dissented from the decision of the majority. The majority of the Board apparently discredited the testimony of the taxpayer's president. The Court of Appeals decided that since the only member of the Board who heard and saw the witness dissented, the findings of the majority of the Board could not have rested upon the appearance of the witness. This Court then proceeded upon the same "cold record" that the majority of the Board had had before it to give credit to the testimony of the witness, reversed the case and remanded it to the Board of Tax Appeals with instructions to annul the deficiency assessed.

The case of *Foss* v. *C. I. R., supra,* presents a striking parallel to the case at bar. In that case Judge Murdock of the Tax Court, then apparently Mr. Murdock of the Board of Tax Appeals, inherited the matter from Mr. Love, also of the Board of Tax Appeals who heard the record on the case but died before he could render an opinion and decision thereon. While the Circuit Court for the First Circuit in that case held that the Board of Tax Appeals had the right to consider the matter on the stenographic report of the testimony taken by Mr. Love and the determination made by Mr. Murdock, nevertheless, and we quote from page 329 of the court's opinion:

> "The fact that no member of the Board which decided the case saw the witnesses lessens the weight of its findings. As was said in *Jewett & Co.* v. *Commissioner,* 61 F. (2d) 471, 472 (C. C. A. 2), 'We have as much before us as those members who decided the case.' L. Hand, *J.*"

It is submitted that the Tax Court has reached such stature today that it is to be regarded as a court and that the decision of a judge who did not hear the witnesses and receive the testimony of record should be remanded for further hearing. However, should this court be of the opinion that the Tax Court is merely an administrative body, the rule that where the member does not hear the case lessens the weight of his findings should be applied, especially since in his opinion Judge Murdock clearly reflects patent misunderstandings of what went on in the Record. The prime example of this is his finding that the only proof the petitioner put in was that he swore to the correctness of his tax returns.

CONCLUSION.

For the reasons assigned and the authorities in support thereof, this Court should grant the writ of certiorari, and, upon the appeal which shall be heard thereon, reverse the decision of the Court of Appeals.

Respectfully submitted,

EDWARD HALLE,
Attorney for Petitioner.

Appendix.

SUPREME COURT OF THE UNITED STATES.

EDWARD HALLE, as executor of the estate of LOUIS HALLE, deceased,

Petitioner,

AGAINST

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Motion to Dispense with Printing of the Exhibits for Use Upon the Proceedings on the Petition for Writ of Certiorari Herein.

Upon the annexed affidavit of Edward Halle, petitioner, in his capacity as executor of the estate of Louis Halle, deceased, said petitioner moves for an Order of this Court to dispense with printing of the exhibits in the above entitled matter for use on the proceedings on the petition for Writ of Certiorari herein and that the original exhibits be considered in the said proceedings in lieu of printed copies thereof.

Dated, November 23, 1949.

Affidavit of Edward Halle in Support of Motion.

SUPREME COURT OF THE UNITED STATES.

EDWARD HALLE, as executor of the estate of LOUIS HALLE, deceased,

Petitioner,

AGAINST

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.:

EDWARD HALLE, being duly sworn, deposes and says:

I am the executor of the estate of Louis Halle, deceased, and the petitioner herein. The facts concerning this cause are set forth in the petition printed herewith.

On December 31, 1946, Honorable Learned Hand, United States Circuit Judge, ordered that Petitioner's Exhibits 1 and 2 and Respondent's A to HH inclusive, which were received in evidence at the hearing before the Tax Court of the United States, need not be printed and that the Clerk of the Tax Court of the United States transmit the said exhibits to the Clerk of the Court of Appeals for use on the hearing of the appeal. Thereafter the physical exhibits were transmitted by the Clerk of the Tax Court to the Clerk of the Court of Appeals for the Second Circuit. Although a printed transcript of

record was prepared for the Court of Appeals, none of the exhibits were printed in pursuance of the aforesaid order and the physical exhibits themselves were available for the Court and Counsel upon the appeal. These exhibits consist of many pages of bank deposit slips, bank ledger sheets and transcripts of stock broker's accounts and it is your deponent's estimate that there are several hundred individual sheets contained in the exhibits. In addition, there is a ledger book included of many hundreds of pages. I have consulted with a representative of the Solicitor General and have been advised that there will be no objection on the part of the Solicitor General to have available for the use of the Court and Counsel the original exhibits in lieu of printed copies thereof.

From my experience in printing records, I estimate that to print copies of these exhibits would run into a cost of at least $1,500 to $2,000. As executor of the estate, I hereby affirm that there are insufficient monies in the estate to cover such an expenditure.

I verily believe that there are questions of law involved herein which merit the consideration of this Honorable Court upon petition for Writ of Certiorari and that upon such consideration that this Honorable Court should grant Certiorari. Unless the Court should grant the instant motion to dispense with the printing of the exhibits for these proceedings the petitioner will be foreclosed from petitioning this Court for review. Such foreclosure would permit the decision of the Court of Appeals to stand in the reports as a precedent that in tax cases fraud may be proved by presumption alone.

WHEREFORE, your deponent prays that this Honorable Court issue its order to dispense with the printing of the exhibits for use on these proceedings, for Writ of Certiorari, and to consider the instant petition upon the origi-

nal exhibits which will be transmitted to this Court by the Clerk of the United States Court of Appeals for the Second Circuit.

EDWARD HALLE.

Sworn to before me this
23rd day of Nov., 1949.

PHILIP F. HALLE,
Notary Public,
State of New York.
No. 24-1640200;
Qualified in Kings County;
Cert. Filed in New York County Clerk's
Commission Expires March 30, 1951.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 467

EDWARD HALLE, AS EXECUTOR OF THE ESTATE OF LOUIS HALLE, DECEASED, PETITIONER [1]

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 52-62) are reported in 7 T. C. 245. The opinion of the Court of Appeals (R. 281-287) is reported in 175 F. 2d 500.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1949. (R. 288.) The petitioner

[1] Upon the death of the taxpayer, Louis Halle, on January 4, 1949, while this case was pending on appeal, the court below entered an order on March 14, 1949, substituting Edward Halle, as executor of the estate of Louis Halle, deceased, as party petitioner. (Pet. 1-2.)

timely filed a petition for rehearing (R. 289), which was denied on July 1, 1949 (R. 303), and on September 12, 1949, this Court entered an order extending the time within which to file a petition for a writ of certiorari to November 26, 1949, inclusive (R. 304). The petition for a writ of certiorari was filed on November 26, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254.

QUESTIONS PRESENTED

1. Whether the court below correctly affirmed the Tax Court's findings and decision upholding the deficiencies in income taxes, and also the imposition of the 50% fraud penalties thereon under Section 293 (b) of the applicable statutes, as asserted against the taxpayer by the Commissioner for each of the taxable years 1929 to 1938, inclusive.

2. Whether the court below properly held that it was not reversible error for one judge of the Tax Court to hear this case and for another judge to write the opinion of the Tax Court.

STATUTES INVOLVED

The applicable statutes are printed in the Appendix, *infra,* pp. 13-17.

STATEMENT

The facts were found by the Tax Court as follows (R. 53-56):

The taxpayer was a resident of New York City and was engaged in the practice of law during the

tax years involved herein. He and his wife, to whom he was married in 1914, filed joint returns for 1929,[2] 1936 and 1937. He filed separate returns for 1930 to 1935, inclusive, and 1938, the other tax years involved herein. His return for 1932 was filed with the Collector of Internal Revenue for the Second District of New York. The other returns were filed with the Collector of Internal Revenue for the Third District of New York. (R. 53-54.)

The taxpayer maintained one or more bank accounts in his own name during all the taxable years and in some of the years he maintained a brokerage account in his own name. Separate bank and brokerage accounts were maintained in the name of the taxpayer's wife during all of the taxable years. Securities purchased through the brokerage accounts were carried in the name of the wife. The taxpayer never acquired or owned any real estate or securities in his own name except in two instances not material hereto. Substantially all of the funds in the wife's bank and brokerage accounts during the years here in question were originally received by her from the taxpayer, except those which represented income or gain from investments. The money was given to her by the taxpayer from his earnings. The taxpayer gave many of the orders to buy or sell securities in his wife's

[2] This finding is erroneous in respect of the taxable year 1929, for the original record on review (Ex. B) shows that the taxpayer's return for that year was not jointly filed with his wife, as the taxpayer states (Pet. 15).

brokerage accounts. He frequently obtained money from his wife when he needed funds. (R. 54.)

Much of the taxpayer's income from the practice of law prior to 1934 was derived from representing persons charged with violation of prohibition laws. His income from that source dropped off somewhat after the repeal of the Eighteenth Amendment. (R. 54.)

The taxpayer spent more than $23,500 for living and other family expenses during 1934. (R. 54.)

The taxpayer, sometimes assisted by his stenographer, kept a loose-leaf book which shows some of his receipts and disbursements during the period beginning at some time in 1934. The loose-leaf book does not completely or clearly reflect the taxpayer's income for that period. He has no records showing any receipts and disbursements prior to 1934. He personally prepared his returns up to the return for 1934 at which time an accountant began to prepare his returns from information furnished by the taxpayer. The accountant did not examine any books or records of the taxpayer. (R. 54-55.)

The Commissioner for each year added to the taxpayer's income as shown on his return, *inter alia*, an item entitled "gross income from business understated." The Commissioner, in determining that those amounts represented additional gross income, examined the bank accounts and brokerage accounts of the taxpayer and his wife. He found

the total amounts deposited in the taxpayer's accounts with those banks and brokers and the amounts in the wife's accounts which came from the taxpayer. He eliminated all duplications, all amounts which could be identified as not representing income of the taxpayer, and all portions of the totals which had been reported as income by the taxpayer. The total net increase in the taxpayer's wealth for each year as thus disclosed was the amount which he added to the taxpayer's income for the year. (R. 55.) The following table shows the net income reported on the returns for the years here in question, the gross income from the taxpayer's business reported on those returns, and the additional gross income from his business which was not reported on those returns (R. 55, 56):

Year	Net Income Reported	Gross Income From Business Reported	Additional Income From Business Not Reported
1929	$25,600.56	$34,110.00	$ 51,750.87
1930	27,785.67	47,168.34	139,069.72
1931	28,497.67	29,497.67	166,056.53
1932	17,809.68	40,654.00	100,222.45
1933	16,778.68	39,875.00	36,138.59
1934	6,500.38	31,356.28	48,487.77
1935	6,992.12	24,866.87	50,268.10
1936	2,451.44 (loss)	9,167.53	41,873.23
1937	6,223.06	8,107.65	36,251.70
1938	7,926.63	19,380.70	27,755.62

The statutory period for assessment and collection of additional taxes for the years 1936, 1937 and 1938 was extended until June 30, 1945, by waivers signed by the parties. (R. 56.)

The notice of deficiencies was mailed on September 29, 1943. (R. 56.)

Each return filed by the taxpayer or by the taxpayer and his wife for the years 1929 to 1938, inclusive, was false and fraudulent with intent to evade tax. (R. 56.)

A part of the deficiency for each year was due to fraud with intent to evade tax. (R. 56.)

Upon the basis of these facts, the Tax Court, affirming the Commissioner's determinations in large part for all taxable years involved (R. 9-34), held that the taxpayer had failed to sustain his burden of proving that the Commissioner's determinations were erroneous, and that the Commissioner had fully sustained his burden of proof on the fraud issue for each taxable year (R. 56-62). The court below affirmed, and held further that it was not reversible error for a judge other than the one who heard the case to write the opinion of the Tax Court. (R. 283-287.)

ARGUMENT

This case presents no question calling for review by this Court. The only reason asserted by the petitioner for allowance of the writ (Pet. 17-18) is that the Tax Court and the Court of Appeals have set a harmful precedent in finding fraud solely on the basis of the presumption of correctness attaching to the Commissioner's determination, rather than on the evidence. The opinions of both lower courts fully disclose that there is no support for the assertion that the findings are not based on evidence.

1. The Commissioner's determination of defi-

ciencies and fraud penalties resulted from the fact that the taxpayer and his wife made large deposits in their bank and brokerage accounts in each of the ten taxable years, which were in excess of the income reported by the taxpayer on his return for each year. (R. 11-34, 54-56, 59, 60-61.) The funds deposited in the wife's accounts came originally from taxpayer's earnings except small amounts representing the wife's income and gains from investments. (R. 54, 61, 95-96, 109, 113, 115, 131, 193, 198, 265.) The testimony of the Revenue Agent who made the examination established that the unreported deposits included in income for each year were determined by eliminating, on the basis of all available records and data, all duplications, all amounts identifiable as not representing income of the taxpayer, and all amounts which had been reported as income by the taxpayer.[3] (R. 148-189, 231-255.) The taxpayer introduced no evidence sufficient to indicate that the unreported deposits were not income. As the court below put it (R. 284-285):

> Against this background, taxpayer and his wife introduced little or no genuine evidence to explain the large sums of money deposited in

[3] The Commissioner conceded in the Tax Court two additional items, aggregating more than $50,000, as not clearly representing understated income for 1931 and 1934, respectively, even though the larger item of $49,149.90 for 1934 was unsatisfactorily explained (R. 112, 124-126, 185-187, 241-242, 263-264), and the Tax Court gave effect thereto in making its findings and decreased the deficiencies accordingly for those years (R. 56, 57, 64).

> the bank and brokerage accounts. The answers of taxpayer and his wife as to items involving large sums of money were halting, inconclusive and evasive. * * * Often, when called on to explain important items involving substantial sums of money, taxpayer resorted merely to a general statement that his returns were true and correct.

Examination of the record will fully support the appellate court's description of this testimony (e.g., R. 56-57, 60, 78-79, 95-96, 109, 112-116, 173-174, 193-197, 200-207),[4] and this despite the fact that the Tax Court had admonished the taxpayer that he had the burden of proof on the substantive issues on which the deficiencies were based (R. 80-81). Nor had he maintained adequate books and records. (R. 55.)

Without reviewing the evidence in detail, it is clear that on the record the Tax Court made the only possible findings, namely, that the unreported deposits were the taxpayer's income as the Commissioner had determined, and that the omission of these amounts from the taxpayer's returns in the taxable years was due to fraud with intent to evade tax. The taxpayer's failure to rebut the Commissioner's evidence as to the unreported deposits, coupled with the consistent omission of these large

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[4] The taxpayer testified that "my returns covered all of my income" for the taxable years involved (1929-1938), and that "the returns as filed are correct." (R. 81.) In the absence of any more convincing evidence, therefore, his "silence then became evidence of the most convincing character." *Interstate Circuit* v. *United States*, 306 U. S. 208, 226.

amounts by taxpayer from income, certainly warranted, and even necessitated, the finding of fraud.

The Tax Court's findings with respect to the understatement by the taxpayer of his income in the taxable years and his fraudulent intent are questions of fact. *Helvering* v. *Kehoe,* 309 U. S. 277, 279; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40. Since these findings are fully supported by the record, the Court of Appeals correctly affirmed the deficiencies and fraud penalties found by the Tax Court.

The decisions cited by the petitioner (Br. 29-31, 36-37) involved different factual situations and are not in any way in conflict with that in the instant case. Indeed, the petitioner does not assert a conflict. Thus, in *Helvering* v. *Taylor,* 293 U. S. 507 (Br. 34), the evidence had established that the Commissioner's determination of income was arbitrary and excessive but did not show the correct income and tax liability. This Court held that remand to the Board of Tax Appeals, for the taking of additional evidence as to the correct tax liability, was proper. In the present case the Commissioner's determination of deficiencies and fraud penalties was not arbitrary and excessive. On the contrary, although on notice of his burden of proof, the taxpayer wholly failed to show that the Commissioner's determination of his income was excessive.

2. The Court of Appeals correctly held that it was not reversible error for one judge of the Tax

Court to hear the case and another judge to make the findings of fact and write the opinion. The statutory provisions governing procedure in the Tax Court clearly show that this was not error. Under Section 1103 (c) of the Internal Revenue Code (Appendix, *infra*, pp. 14-15) the presiding judge of the Tax Court has full authority to assign one or more judges to a division and to fill vacancies occurring in the division thereafter. The division is required by Section 1118 (Appendix, *infra*, pp. 16-17) to hear a proceeding assigned to it by the presiding judge and to make a report, consisting of findings of fact and opinion (Section 1117 (Appendix, *infra*, pp. 15-16)) thereon, to the whole Tax Court. The division's report becomes the report of the Tax Court after the lapse of 30 days unless within that time the presiding judge directs that the report shall be reviewed by the whole court. Thus, Congress provided for the assignment of another judge to fill a vacancy in a division assigned to hear and report a case to the full court, in precisely the manner that was followed here. The fact that the vacancy occurred and was filled after the hearing is immaterial, since the statute sets out no limitations on the filling of a vacancy in the division. Indeed, Section 1118 (b) (Appendix, *infra*, pp. 16-17) confirms this conclusion, since the authority given for review by the whole Tax Court (sixteen judges) necessarily means that most of the judges who participate in the Tax Court's report will not have

seen and heard the witnesses. The transcript of the evidence introduced at the hearing was, of course, available to and was used by the substituted judge in making his report.

Not only does the statute authorize the practice of the Tax Court in this situation, but appellate courts have recognized that it is not essential to the validity of the decision of the Tax Court that the judge who makes the findings and writes the opinion shall have seen and heard the witnesses. *Seaside Improvement Co.* v. *Commissioner,* 105 F. 2d 990, 992 (C.A. 2d), certiorari denied, 308 U. S. 618; *Davidson* v. *Commissioner,* 91 F. 2d 516, 518 (C.A. 5th); *Foss* v. *Commissioner,* 75 F. 2d 326 (C.A. 1st); *Garden City Feeder Co.* v. *Commissioner,* 75 F. 2d 804 (C.A. 8th); *Powell* v. *Commissioner,* 94 F. 2d 483, 485-486 (C.A. 1st); cf. *Banister* v. *Solomon,* 126 F. 2d 740, 741-742 (C.A. 2d); *Standard Oil Co.* v. *United States,* 7 F. Supp. 301 (C. Cls.), certiorari denied on other grounds, 293 U. S. 599.

As the court below stated (R. 287), the cases relied on by the taxpayer (Br. 41-43) contain nothing at variance with the above principles. Thus, *Jewett & Co.* v. *Commissioner,* 61 F. 2d 471 (C.A. 2d), and *Commissioner* v. *National Carbide Corp.,* 167 F. 2d 304, 307 (C.A. 2d), affirmed, 336 U. S. 422, involved entirely different factual situations and questions. *Foss* v. *Commissioner,* 75 F. 2d 326 (C.A. 1st), recognized the rule stated above, although it reversed the Tax Court for other reasons not applicable here. *S. Buchsbaum & Co.* v. *Fed-*

eral Trade Commission, 153 F. 2d 85 (C.A. 7th) remanded, 328 U. S. 818, re-decided on the merits, 160 F. 2d 121, did not involve the Tax Court and the statutory provisions governing it, and is consequently inapplicable. Moreover, that case involved a factual situation different from that here presented.

CONCLUSION

The decision of the court below is in all respects correct, turns on the particular facts of this case and presents no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
HELEN GOODNER,
S. DEE HANSON,
Special Assistants to the Attorney General.

JANUARY, 1950.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(a) *General definition.* — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

SEC. 276. SAME.—EXCEPTIONS.

(a) *False return or no return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(b) *Waivers.*—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent

agreements in writing made before the expiration of the period previously agreed upon.

* * * * *

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

Sections 22 (a), 276 (a) and (b), and 293 (b) of the Revenue Acts of 1932 (c. 209, 47 Stat. 169), 1934 (c. 277, 48 Stat. 680), 1936 (c. 690, 49 Stat. 1648), and 1938 (c. 289, 52 Stat. 447) contain provisions which are identical with the corresponding sections of the Revenue Act of 1928, above quoted.

Internal Revenue Code:

SEC. 1103. ORGANIZATION.

* * * * *

(b) *Designation of Chairman.*—The Board shall at least biennially designate a member to act as chairman.

(c) *Divisions.*—The chairman may from time to time divide the Board into divisions of one or more members, assign the members of

the Board thereto, and in case of a division of more than one member, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than the number of members designated for the division, the chairman may assign other members to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of members thereto.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1103.)

SEC. 1112. BURDEN OF PROOF IN FRAUD CASES.[5]

In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner.

(26 U.S.C. 1946 ed., Sec. 1112.)

SEC. 1117. REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Board and a de-

[5] The forerunner of this section was Section 907 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, as added by Section 1000 of the Revenue Act of 1926, c. 27, 44 Stat. 9, and amended by Section 601 of the Revenue Act of 1928, which provided as follows:

SEC. 907. (a) * * *. In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, where no hearing has been held before the enactment of the Revenue Act of 1928, the burden of proof in respect of such issue shall be upon the Commissioner. * * *.

cision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Board, and such decision so made shall, when entered, be the decision of the Board.

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions and memorandum opinions.

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(26 U.S.C. 1946 ed., Sec. 1117.)

SEC. 1118. PROVISIONS OF SPECIAL APPLICATION TO DIVISIONS.

(a) *Hearings, Determinations, and Reports.*—A division shall hear, and make a determination upon, any proceeding instituted before the Board and any motion in connection therewith, assigned to such division by the chairman, and shall make a report of any such determination which constitutes its final disposition of the proceeding.

(b) *Effect of Action by a Division.*—The report of the division shall become the report of the Board within 30 days after such report by the division, unless within such period the chairman has directed that such report shall be reviewed by the Board. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be

subject to review by the Board except in accordance with such rules as the Board may prescribe. The report of a division shall not be a part of the record in any case in which the chairman directs that such report shall be reviewed by the Board.

(26 U.S.C. 1946 ed., Sec. 1118.)

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